

## FEDERAL ELECTION COMMISSION WASHINGTON, D.C. 20463

OCT 2 7 2016

Harry N. Niska Ross and Orenstein LLC 222 South Ninth Street, Suite 470 Minneapolis, MN 55402

RE: MUR 6794

Dear Mr. Niska:

On March 18, 2014, the Federal Election Commission ("Commission") notified your clients, Thomas E. Emmer, Emmer for Congress, and Karin Housley, in her official capacity as treasurer, of a complaint alleging violations of the Federal Election Campaign Act of 1971, as amended (the "Act") and Commission regulations.

Upon further review of the allegations contained in the complaint and information provided by your client and by Emmer for Congress ("the Committee"), on October 18, 2016, the Commission voted to the Commission decided to exercise its prosecutorial discretion to dismiss the complaint and close its file in this matter. Accordingly, the Commission closed its file in this matter on October 18, 2016. The Factual and Legal Analysis, which more fully explains the Commission's findings, is enclosed for your information.

Based on the information before the Commission, it appears that the Committee may have violated 52 U.S.C. § 30118(a) and 11 C.F.R. § 114.2(d) when the candidate appeared in a televised advertisement for a corporation. The Commission cautions the Committee to take steps to ensure that its conduct is in compliance with the Act and Commission regulations.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66,132 (Dec. 14, 2009). The Factual and Legal Analysis, which explains the Commission's finding, is enclosed for your information.

Emmer for Congress MUR 6794 Page 2

If you have any questions, please contact Don Campbell, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

Lisa J. Stevenson Acting General Counsel

BY:

Assistant General Counsel Complaints Examination and Legal Administration

Enclosure
Factual and Legal Analysis

## FEDERAL ELECTION COMMISSION

1 2	FACTUAL AND LEGAL ANALYSIS							
3 4 5 6 7	RESPONDENTS:			Emmer for Congress and Jennifer Niska, as treasurer <sup>1</sup> Thomas Emmer Integrity Exteriors and Remodelers, Inc. Renters Warehouse <sup>2</sup>		MUR 6794		
8 9 10 11	I.	INTRODUCTION						
		This matter was generated by a complaint alleging violations of the Federal Election						
12	Campaign Act of 1971, as amended ("the Act") and Commission regulations by Emmer for							
13	Congress and Jennifer Niska, in her official capacity as treasurer, (the "Committee"), Thomas							
14	Emmer, Integrity Exteriors and Remodelers, Inc. ("Integrity"), and Renters Warehouse. It was							
15	scored as a low-rated matter under the Enforcement Priority System, by which the Commission							
16	uses formal scoring criteria as a basis to allocate its resources and decide which matters to							
17	pursu	e.						
18	n.	FAC'	TUAL AND	LEGAL ANA	LYSIS			
19		A.	Factual Ba	ackground				
20	The Complaint alleges that the Committee accepted a prohibited in-kind corporate							ate
21	contribution from Integrity when Emmer appeared in its television and internet advertisement to							
22	recommend Integrity. In the video, Emmer states that he is a candidate for Congress and stands							
23	in front of an "Emmer for Congress" sign that contains a printed disclaimer reading "Paid for by							
24	Emmer for Congress." Compl. at 2-5. In addition, the Complaint implies that Renters							

Emmer for Congress was the principal campaign committee in 2014 for Congressman Thomas Emmer, the current representative for Minnesota's 6th Congressional District. Karin Housley was treasurer of the Committee at the time of the Complaint and the Committee's response. On June 2, 2014, the Committee filed an amended Statement of Organization naming Jennifer Niska as treasurer.

Renters Warehouse was inadvertently not notified of the Complaint. See 52 U.S.C. § 30109(a)

Dismissal and Case Closurc — MUR 6794 Factual and Legal Analysis Page 2

- 1 Warehouse made in-kind corporate contributions when Emmer appeared in its infomercials that
- 2 aired at least five times after he became a candidate and appeared as a special guest at its
- 3 "Cocktails and Conversation" event after Emmer became a candidate. Id. at 5-6.
- 4 The Committee and Integrity deny that any prohibited contribution resulted from the
- 5 advertisement. Committee Resp. at 1-2, 5; Integrity Resp. at 1-3. The Committee asserts that
- 6 Emmer filmed a testimonial regarding the quality of Integrity's work at Integrity's request, but
- 7 claims that Integrity was not authorized to broadcast it, and upon learning that the ad was being
- 8 aired, the Committee directed Integrity to stop. Committee Resp. at 3, David FitzSimmons Aff.
- 9 at 1. Integrity states that it aired the ad without the Committee's knowledge or approval, and
- states that the ad did not contain express advocacy. Integrity Resp. at 3. Respondents state that
- after the Committee learned of the ad on September 29, 2013, the Committee requested an
- 12 invoice for the costs of airing the ad, Integrity promptly sent an invoice for \$850, and the
- 13 Committee paid it on October 14, 2013. Committee Resp. at 3, Ex. A at 11; Integrity Resp. at 1.
- 14 Thus, respondents deny the ad met the definition of a coordinated communication because the
- 15 Committee paid for it. Committee Resp. at 5; Integrity Resp. at 3.
- 16 As to the Renters Warehouse infomercial, the Committee states that it was created before
- 17 Emmer became a candidate, asserts that it does not satisfy the content prong of the
- 18 Commission's coordinated communication regulations, and states that at the Committee's
- 19 request, Renters Warehouse stopped airing the infomercial after Emmer became a candidate.
- 20 Committee Resp. at 2-3, 5. The Committee asserts that Emmer attended the "Cocktails and
- 21 Conversation" event as a radio station host, not in connection with his recently announced
- 22 candidacy. Committee Resp. at 2-3. The respondents argue that any potential violations are de
- 23 minimis. Committee Resp. at 1; Integrity Resp. at 4.

1

2

3

5

6

7

8

9

10

11

12

13

Dismissal and Case Closure — MUR 6794 Factual and Legal Analysis Page 3

## B. Legal Analysis

Corporations are prohibited from making contributions to federal candidates, and candidates are prohibited from knowingly accepting them.<sup>3</sup> A contribution is "anything of value made by any person for the purpose of influencing an election for Federal office." The term "anything of value" includes in-kind contributions. When a political committee makes a disbursement for the purpose of financing any communication through any broadcasting station, the communication must include a proper disclaimer. All public communications by any person that expressly advocate the election or defeat of a clearly identified candidate must also include a proper disclaimer. Political committees are required to report contributions they receive. The available information indicates that Integrity's television ad which identified Emmer as a candidate, and included a sign reading "Emmer for Congress," triggered the Act's disclaimer requirements. There is also information in the record that suggests that the ad

qualified as an in-kind contribution. 10

<sup>&</sup>lt;sup>3</sup> 52 U.S.C. § 30118(a); 11 C.F.R. §§ 114.2(a), (d).

<sup>&</sup>lt;sup>4</sup> 52 U.S.C. § 30101(8).

<sup>&</sup>lt;sup>5</sup> 11 C.F.R. § 100.52(d)(1). Additionally, a third party's public communication that is coordinated with a candidate is considered to be an in-kind contribution. See 52 U.S.C. § 30116(a)(7)(C); 11 C.F.R. §§ 109.21(b)-(d).

<sup>52</sup> U.S.C. §§ 30120(a)(1), 30120(d)(1)(B); 11 C.F.R. §§ 110.11(b)(1), 110.11(c)(3)(ii)-(iii).

<sup>&</sup>lt;sup>7</sup> 52 U.S.C. §§ 30120(a)(2)-(3), 30120(d)(2); 11 C.F.R. §§ 110.11(b)(2)-(3), 110.11(c)(4).

<sup>&</sup>lt;sup>8</sup> 52 U.S.C. § 30104(b)(2).

See 11 C.F.R. § 100.22(a) (listing "Smith for Congress" as an example of a phrase containing express advocacy).

There is information in the record supporting an inference that the ad may have met the definition of a coordinated communication. Specifically, Integrity created and initially paid for the ad, the ad appears to be a public communication containing express advocacy, and Emmer filmed a video testimonial at Integrity's request. 11 C.F.R. §§ 109.21(a)(1) (paid for by a person other than the candidate or authorized committee); 109.21(c)(3) (a public communication that expressly advocates for the election of a candidate); 109.21(d)(1)-(3) (the communication is created by another person and the candidate assents to the creation of the communication; the candidate is materially involved regarding the content of the communication; and the communication is created after

9

10

11

12

13.

14

15

Dismissal and Casc Closure — MUR 6794 Factual and Legal Analysis Page 4

The facts here, including the apparent *de minimis* amounts at issue, support dismissing this claim as a matter of prosecutorial discretion. Although Integrity's ad may have been an inkind contribution, and it lacked a disclaimer saying that Integrity paid for it, Integrity apparently only ran it briefly before pulling it from the air at Emmer's request. Respondents also attest that all costs associated with the ad totaled \$850. After reviewing the ad, it appears to be an unsophisticated ad for a small, local business, thus the Commission believes that the costs associated with creating and broadcasting the ad were modest. Further, the Committee promptly reimbursed Integrity for the costs of the ad.

As for the Renters Warehouse infomercial, the Committee denies that it satisfies any content standard of the coordinated communication test, <sup>11</sup> and there is no evidence in the record to the contrary. Further, it appears that the costs associated with the "Cocktails and Conversations" event were likely small. Accordingly, based on the apparently small amounts at issue in this matter, and in furtherance of the Commission's priorities relative to other matters pending on the Enforcement docket, the Commission exercises its prosecutorial discretion and dismisses the allegations pursuant to *Heckler v. Chaney*, 470 U.S. 821 (1985).

the person paying for the communication and the candidate who is clearly identified in the communication have engaged in one or more substantial discussions about the communication). See also 11 C.F.R. § 109.21(d) (any of the listed types of conduct satisfy the conduct standard whether or not there is agreement or formal collaboration); and 109.21(e) (agreement or formal collaboration between the person paying for the communication and the candidate clearly identified in the communication is not required for a communication to be a coordinated communication).

<sup>11</sup> C.F.R. § 109.21(c).